

JUN 7 1978

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1366

GILES LOWERY STOCKYARDS, INC., D/B/A LUFKIN
LIVESTOCK EXCHANGE,

Petitioner,

VS.

THE U. S. DEPARTMENT OF AGRICULTURE AND THE
PACKERS AND STOCKYARDS—AMS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY MEMORANDUM IN SUPPORT OF THE PETITION

RICHARD A. KOEHLER

ROBERT M. COOK

Suite 306

4900 Oak Street

Kansas City, Missouri 64112

A/C 816 531-2235

Attorneys for Petitioner

TABLE OF CASES

<i>N.L.R.B. v. Bell Aerospace Co.</i> , 416 U.S. 267, 94 S.Ct. 1757, 40 L.Ed.2d 134 (1974)	3
<i>N.L.R.B. v. Wyman-Gordon Co.</i> , 394 U.S. 759, 89 S.Ct. 1426, 22 L.Ed.2d 700 (1969)	3
<i>S.E.C. v. Chenery Corp.</i> , 332 U.S. 194, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947)	3

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1366

**GILES LOWERY STOCKYARDS, INC., D/B/A LUFKIN
LIVESTOCK EXCHANGE,**

Petitioner,

vs.

**THE U. S. DEPARTMENT OF AGRICULTURE AND THE
PACKERS AND STOCKYARDS—AMS,**

Respondents.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**REPLY MEMORANDUM IN SUPPORT
OF THE PETITION**

The Packers and Stockyards—AMS and the United States Department of Agriculture state, at pages 3 and 4 of their Memorandum In Opposition:

“Petitioner seeks to distinguish these cases on the ground that the Department had adopted and applied the ratemaking principles approved in the instant case as early as 1970 (Pet. 12-16). Thus, petitioner asserts, the principles were not adopted in either rulemaking or adjudication. But although a number of the theories that the Department formally adopted (for the first time) in this case had been applied on an informal case-by-case basis in previous years, that does not

make their formal adoption less appropriate or valid. They escaped authoritative announcement only because, until the present case, none had been challenged in a contested action. . . ."

"It must follow that the Department was not obliged to publish its ratemaking procedures prior to the decision of the judicial officer, and that the procedures used here did not violate the FOIA. Procedures cannot be published before they have been adopted; when procedures are adopted in adjudication, the agency's opinion always will be the first formal publication. . . ."

By way of reply to Respondents' Memorandum In Opposition in general, and to the above-quoted material, in particular, Petitioner Giles Lowery Stockyards, Inc. makes the following points:

1. When Agency witness Jack W. Brinckmeyer, Chief of the Rates, Services and Facilities Branch of the Packers and Stockyards—AMS, states, for example, with respect to the computed allowance for the use of land, A119, "We adopted that approximately (in 1968). . . .", the simple and specific question is: "Why wasn't it announced to those affected so that they could have a chance to govern their businesses accordingly?" While the Respondents try to divert the Court's attention with a characterization that the Agency's use of its rate analysis methodology was "informally . . . applied", the testimony of Mr. Brinckmeyer, quoted so often in both the Decision of the Judicial Officer and in the Initial Decision of the Administrative Law Judge is definitely that the Agency did in fact *adopt* and *apply* its rate analysis methodology to those regulated without providing the regulated marketing businesses the opportunity to operate in accordance with the Agency's adopted policy.

2. This Court stated in *N.L.R.B. v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 94 S.Ct. 1757, 40 L.Ed.2d 134 (1974) at 293, 294 (1771):

And in *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759, 89 S.Ct. 1426, 22 L.Ed.2d 709 (1969), the Court upheld a Board order enforcing an election list requirement first promulgated in an earlier adjudicative proceeding in *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966). The plurality opinion of Mr. Justice Fortas, joined by the Chief Justice, Mr. Justice Stewart, and Mr. Justice White, recognized that "adjudicated cases may and do . . . serve as vehicles for the formulation of agency policies, which are applied and announced therein," and that such cases "generally provide a guide to action that the agency may be expected to take in future cases." *N.L.R.B. v. Wyman-Gordon Co.*, *supra*, at 765-766, 89 S.Ct. at 1429.

A review of the three leading authorities, *S.E.C. v. Chenery Corp.*, 332 U.S. 194, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947); *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759, 89 S.Ct. 1426, 22 L.Ed.2d 709 (1969); and *N.L.R.B. v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 94 S.Ct. 1757, 40 L.Ed.2d 134 (1974), on the choice of ad hoc litigation vs. rulemaking cannot be squared with the Agency having a key witness (Mr. Jack W. Brinckmeyer), mount the witness stand and under oath in a full hearing in June, 1974, begin to testify about policy (rate analysis methodology) adopted as far back as 1968—six (6) years previously; but never announced to those affected by such policy. And this was done again and again. Hence, the rate analysis methodology was not "applied and announced" in the administrative hearing below. Rather, it was adopted and applied by the Agency in years prior to the hearing below; but, without giving knowledge of its adoption, application, and

interpretation to those regulated. This underscores the extreme importance of Question 1 to the field of administrative law.

3. In summary, as opposed to the concept of the agency's rate analysis methodology being derived from an adjudicatory hearing in 1974, the rate analysis and corresponding dates of implementation are outlined as follows:

- A. Obtain Actual Expenses Of The Marketing Business.
- B. Obtain Adjusted Expenses By Removing:
 - 1. Expenses irrelevant to market's consignors of livestock.
 - 2. Owners' compensation and salary.
 - 3. Bad debt losses.
 - 4. Business getting and maintaining expenses.
- C. Add Allowances For:
 - * 1. Compensation for working owners (1970) (A59-A61);
 - * 2. Owners' management (1970) (A61);
 - * 3. Interest on working capital;
 - * 4. Business getting and maintaining expenses (A116-A117);
 - 5. Return on buildings and equipment (1969) (A77);

*Note: The "removals" of Part B are later replaced with "allowances" in Part C, and the marked allowances are based on a computation involving the animal unit concept, with 1969 being the earliest firm date referenced in either the Initial Decision and Order of the Administrative Law Judge, see Appendix "C" beginning at A100, and the Decision and Order of the Judicial Officer, Appendix "B", beginning at A15.

- * 6. Use of land (1969) (A124-A125);
- 7. Bad debts (1968) (A64);
- * 8. Operating margin (A128).
- D. Obtain Reasonable Revenue Requirement (B + C).
- E. Compare Actual Revenue Of The Marketing Business To The Reasonable Revenue Requirement.

Hence, Petitioner prays that its Petition For A Writ Of Certiorari be granted.

Respectfully submitted,

RICHARD A. KOEHLER

Suite 306

4900 Oak Street

Kansas City, Missouri 64112

A/C 816 531-2235

Attorney for Petitioner